



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 10-07814
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: Barry M. Sax, Esquire

September 29, 2011

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant’s clearance is granted.

On 12 May 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct.² Applicant timely answered the SOR, requesting a hearing. DOHA assigned the case to me 29 July 2011, and I convened a hearing 1 September 2011. DOHA received the transcript (Tr.) 12 September 2011.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-3, and Applicant exhibits (AE) A-B.

²DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the SOR allegations. He is a 24-year-old criminal analyst employed by a Government contractor since June 2010. He has not previously held a clearance, but needs one to work on his employer's law enforcement contract.

When Applicant applied for an industrial security clearance in June 2010 (GE 1), he answered "yes" to a question (23b) asking him to disclose any illegal drug use in the last seven years. He explained that from January 2008 to April 2009, he used marijuana "approximately two times every two months throughout the time period listed above." He further stated that "[t]he only time I ever smoked it was at college parties when it was handed to me and I took a hit or two. Again it was something that I did in college and was just experiencing what it was like several times."

In July 2010, Applicant made an unsworn statement to a Government investigator (GE 2). He stated that he made a mistake by using an ending date of April 2009 for his marijuana use when the correct date was April 2008. He described using marijuana on two occasions, and proceeded to describe parties in February 2008 and April 2008 where he used marijuana. He did not state the number of times he used marijuana on each occasion. The investigator did not ask Applicant about any perceived discrepancy between the marijuana use reported on his clearance application and that reported during the interview.

At hearing, Applicant explained that he used marijuana at two parties in February 2008 and April 2008, and took two "hits" of marijuana at each party (Tr. 26-28). He testified credibly that he saw no meaningful difference between his disclosure on his clearance application and his disclosure during the subject interview.

The Government accepted Applicant's correcting the end date of his marijuana use to April 2008, but found a deliberate falsification in the differences between only using marijuana "on two occasions in February and April 2008" and using marijuana "several times from January 2008 through April 2008, at a frequency of approximately two times every two months."

In December 2009, Applicant was charged with burglary and theft. In June 2010, he was awarded accelerated rehabilitative disposition, the successful completion of which in June 2011 would make him eligible for expungement of the record. Applicant was released from probation in June 2011 and his record was expunged in August 2011 (AE B).

The facts leading to his arrest are these: his last semester of college, Applicant went to a bar, got drunk (10 beers), and got cut off by the bartender and bounced from the bar. Applicant got mad, returned to the bar, kicked in a back door, made a spur-of-the-moment decision to take some liquor, and was caught on a surveillance camera. Applicant learned through a friend that he had been identified and the police were looking for him, and he surrendered on his own. Applicant went to an alcohol counselor

for a few sessions in February 2010, and attended three Alcoholics Anonymous meetings before his court date. The counselor found Applicant to be a binge drinker and recommended that he refrain from drinking—a recommendation Applicant has followed since.

Applicant's work and character references consider him honest and trustworthy. His character references are long-time family friends, and are aware of his December 2009 arrest. None of his references appears to be aware of his marijuana use.

Policies

The adjudicative guidelines (AG) list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.³

Analysis

Notwithstanding Applicant admitting the SOR allegations, the Government failed to establish a case for disqualification for falsifying his unsworn statement under Guideline E. Applicants are not expected to describe their drug history—or indeed any information required to be disclosed on a clearance application or during a subject interview—with mathematical precision. Once the Government decided (as it did by issuing the SOR) that Applicant's marijuana use was limited to the period between January and April 2008, the difference, if any, between "two times every two months"

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

and “two hits on two occasions” lacks security significance.⁴ Tellingly, after correcting April 2009 to April 2008 as requested by Applicant, the investigator saw no discrepancy between Applicant’s two descriptions of his marijuana use. Common sense says there is no difference between the two with any security significance.

In similar fashion, while Applicant’s arrest for criminal activity undertaken while he was drunk demonstrates poor judgment cognizable under Guideline E,⁵ Applicant has mitigated any security concerns by his successful completion of his probation requirements, expungement of the record, and his independent decision to refrain from drinking—resulting in no further criminal conduct. I resolve Guideline E for Applicant.

Formal Findings

Paragraph 1. Guideline E:	FOR APPLICANT
Subparagraph a:	For Applicant
Subparagraph b:	For Applicant

Conclusion

In view of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge

⁴¶ 16.(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . .;

⁵¶ 16.(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;